TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 351.

WESTERN LOAN AND SAVINGS COMPANY, PLAINTIFF IN ERROR,

vs.

BUTTE AND BOSTON CONSOLIDATED MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED JUNE 6, 1907.

(20,754.)

(20,754.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 351.

WESTERN LOAN AND SAVINGS COMPANY, PLAINTIFF IN ERROR,

vs.

BUTTE AND BOSTON CONSOLIDATED MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

INDEX.

	Original.	Print.
Caption ..... (omitted in printing)..	1	—
Complaint ..... (" ")..	2	—
Summons ..... (" ")..	11	—
Demurrer to complaint ..... (" ")..	14	—
Motion to strike out part of complaint ..... (" ")..	19	—
Order on motion to strike and demurrer .... (" ")..	22	—
Amended complaint ..... (" ")..	24	—
Motion to strike out part of amended complaint (omitted in printing)	34	—
Demurrer to amended complaint ..... (omitted in printing)..	37	—
Order granting leave to file second amended complaint (omitted in printing)	42	—
Second amended complaint ..... (omitted in printing)..	44	—
Motion to strike from second amended complaint (omitted in printing)	61	—
Demurrer to second amended complaint .... (omitted in printing)..	64	—
Memorandum opinion and order overruling demurrer as to jurisdiction	69	1
Memorandum opinion and order dismissing case for want of jurisdiction	73	2

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1907.

	Original.	Print.
Judgment	75	3
Clerk's certificate to judgment-roll	76	3
Assignment of errors	78	4
Petition for writ of error	81	5
Order fixing amount of bond on writ of error	84	6
Certificate of question of jurisdiction	87	7
Complaint	89	7
Demurrer to complaint	98	12
Second amended complaint	102	14
Demurrer to second amended complaint	120	22
Judge's certificate	123	23
Bond on writ of error	125	24
Citation and service	128	25
Writ of error	131	25
Clerk's certificate	134	27
Specification of errors relied on and designation by counsel for plaintiff in error of parts of record to be printed and consent thereto by counsel for defendant in error	135	27

1-69 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Memorandum Order Overruling Demurrer for Lack of Jurisdiction.

This case appears to be one where jurisdiction is invoked upon the ground of a diversity of citizenship, plaintiff being a citizen of Utah and defendant a citizen of Colorado, doing business in Montana.

Jurisdiction of the subject matter is clearly conferred in actions like this upon the circuit court of the United States, the record showing diversity of citizenship, which is the condition of jurisdiction. It would make no difference, though, if there were a federal question involved as well.

Proceedings to bring the defendant within the jurisdiction of the court are not matters touching the general jurisdiction of the court over the cause. As to such proceedings, the act of Congress of March 3, 1887, corrected by the Act of August 13, 1888, obtains, and provides, that the action shall be brought only in the district of the residence of either the plaintiff or defendant. An action, if within the general jurisdiction of the court, may be instituted in the
70 wrong district, and where proceedings are taken to bring a defendant within the jurisdiction of the court in such wrong district, he may make seasonable objection; or he may waive his privilege to be sued in the right district.

Interior Construction & Improvement Company *vs.* Gibney, 160 U. S., 217.

This privilege or right accorded a defendant to insist upon being sued within a particular district is regarded as in the nature of a personal exemption in a defendant's favor. He may therefore waive it by entering a general appearance in a suit brought in a district of which he is not an inhabitant.

In re Keasbey and Mattison Company, 160 U. S., 221.

The principle is that what is in the nature of a personal privilege does not affect the general jurisdiction of the court, but only goes to the privileges of a defendant who may consent to be sued wherever he pleases.

Ex parte Shollenberger, 96 U. S., 369.

Central Trust Company *vs.* McGeorge, 151 U. S., 129.

Defendant having interposed its demurrer upon jurisdictional and other grounds, not confined to jurisdiction, but reaching to the merits of the action, and the court having jurisdiction of the subject matter,

has waived its privilege in respect to the particular court in which the action is brought.

Such is the logical conclusion that flows from the rule that defendants privilege is a personal one, not affecting the general jurisdiction of the court; and such is clearly the holding of the Supreme Court in the case of

St. Louis, etc., R. R. Co. *vs.* McBride, 141 U. S., 127.

71 Lowry *vs.* Tile, 98 Fed., 817.

Texas & Pac. Railway *vs.* Saunders, 151 U. S., 105.

As the questions presented pertain to jurisdiction and to place of trial under the federal statutes, the controlling decisions are those of the federal Courts.

Demurrer as to Jurisdictional questions over-ruled. As to all other points, demurrer to stand for hearing.

Dated October 26, 1906.

WM. H. HUNT, *Judge.*

Endorsed: Title of court and cause. Memorandum Order overruling demurrer for lack of Jurisdiction. Filed Oct. 26, 1906. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy.

72 And thereafter, to-wit, on the 18th day of March, 1907, the following order was duly made and entered herein, in the words and figures following, to-wit:

73 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 201.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,

vs.

BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

John A. Shelton, attorney for plaintiff.

A. J. Shores, Forbis & Evans and C. F. Kelley attorneys for defendant.

HUNT, *District Judge:*

As neither party to this action was at the time of the institution thereof, a citizen or resident of the State of Montana, upon the authority of *ex parte* Abram C. Wisner, decided by the Supreme Court December 10th, 1906, and followed by the Court of Appeals of this Circuit in Yellow Aster Mining Company and Southern Pacific Company *vs.* R. M. Burch, decided February 11th, 1907, I must reverse the ruling heretofore made by me upon the demurrer and dismiss the case for lack of jurisdiction.

So Ordered.

Endorsed: Order dismissing case Filed and entered Mar- 18, 1907 Geo. W. Sproule, Clerk.

74 And thereafter, to-wit, on the 29th day of April, 1907, judgment was duly rendered and entered herein, in the words and figures following, to-wit:

75 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Judgment.

This cause having been heretofore submitted upon the demurrer of the defendant to the complaint of the plaintiff, and said demurrer having been overruled and an order having been subsequently made herein reversing the previous order of the court and sustaining the said demurrer upon the ground that the court had no jurisdiction of the cause; and said cause having been ordered dismissed for want of jurisdiction;

Now, therefore, in consideration of the law and the premises aforesaid, it is ordered, adjudged and decreed that the said cause be, and the same is hereby dismissed for want of jurisdiction.

Witness the Honorable William H. Hunt, Judge of the said Court.

Attest my hand and the seal of said court at Butte Montana this 29th day of April, 1907.

GEO. W. SPROULE, *Clerk.*

Endorsed: Title of court and cause Judgment Filed and entered Apr- 29, 1907. Geo. W. Sproule, Clerk.

76 UNITED STATES OF AMERICA, *District of Montana, ss:*

I, George W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment roll in the above entitled action.

Witness my hand and seal of said Court at Butte Montana, this 29th day of April, 1907.

GEO. W. SPROULE, *Clerk.*
By F. H. DRAKE, *Deputy Clerk.*

Endorsed: Title of court and cause: Judgment Roll Filed Ap'l 29th, 1907. George W. Sproule, Clerk By F. H. Drake, Deputy Clerk.

77 And thereafter to-wit on the 29th day of April Assignment of errors was filed herein which is entered of record as follows, to-wit:

78 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Assignment of Errors.

Comes now the plaintiff herein and assigns errors in the decision of judgment of the Circuit Court of the United States for the District of Montana, in the above entitled cause, as follows:

First. The court erred in sustaining the demurrer of the defendant to the second amended complaint of the plaintiff on the first and second grounds thereof.

Second. The court erred in making its order that the said case be dismissed for lack of jurisdiction.

Third. The court erred in holding that it had no jurisdiction of the subject matter and parties in the above entitled action, and in dismissing the said case.

Fourth. The court erred in entering judgment of dismissal herein and in adjudging that the said cause be dismissed.

In order that the foregoing assignment of errors may be and appear of record, the plaintiff presents the same to the court and prays that such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided; and plaintiff prays a reversal of the said order sustaining the

79 said demurrer and in ordering a dismissal of the said case and of the judgment of dismissal made and entered herein.

JOHN A. SHELTON,
Attorney for Plaintiff.

Service of the above and foregoing assignment of errors, by copy thereof, admitted this — day of April, 1907.

——— ———,
——— ———,
Attorneys for Defendant.

Endorsed: Title of court and cause. Assignment of errors. Filed Ap'l 29th, 1907. Geo. W. Sproule, Clerk.

80 And thereafter to-wit on the 29th day of Apr., 1907, a petition for writ of error and order allowing same was filed herein which is entered of record as follows, to-wit:

81 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Petition for Writ of Error and Order Allowing the Same.

To the Honorable William H. Hunt, Judge of the said Court:

This, the petition of the plaintiff herein, to the court respectfully shows and alleges:

That on or about the 18th day of March, 1907, an order was made herein sustaining the demurrer of the defendant to the second amended complaint of the plaintiff upon the ground of lack of jurisdiction of the said case; and that thereafter and on or about the 29th day of April, 1907, a judgment was made and entered herein dismissing the said case; that in the said judgment and the proceedings herein had prior thereto in this court, certain errors were committed to the prejudice of the said plaintiff; all of which will more in detail appear from the assignment of errors on file with this petition.

Wherefore plaintiff prays an order of this court allowing the said plaintiff to prosecute a writ of error to the Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided; and that the transcript of the records, papers and proceedings in this case, duly au-
82 thenticated, may be sent to the Supreme Court of the United States, and that an order may be made herein fixing the amount of security which the plaintiff shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error in said Supreme Court of the United States.

And your petitioner will ever pray.

JOHN A. SHELTON,
Attorney for Petitioner.

It is ordered that the writ of error above prayed for be allowed this 29th day of April, 1907.

WILLIAM H. HUNT, *Judge.*

Endorsed: Title of court and cause. Petition for writ of error and order allowing the same. Filed and entered Apr. 29, 1907. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy.

83 And thereafter to-wit on the 29th day of April, 1907, an order fixing amount of bond was filed and entered which is entered of record as follows, to-wit:

84 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Order Fixing Amount of Bond on Writ of Error.

The plaintiff herein, Western Loan & Savings Company, a corporation, having this day filed its petition *wor* a writ of error from the decision and judgment thereon made and entered herein on or about the 29th day of April, 1907, to the Supreme Court of the United States, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which plaintiff shall give and furnish upon the said writ of error:

Now, therefore, it is ordered that, upon the said plaintiff filing with the clerk of this court a good and sufficient bond in the sum of $500, to the effect that if said plaintiff (the same being the plaintiff in error herein), shall prosecute the said writ of error herein to effect and answer all damages and costs if it fail to make the said plea good; then the said obligation to be void; otherwise to be and remain in full force and effect, the said bond to be approved by this court, that all further proceedings in this court be stayed until the determination of the said writ of error by the said Supreme Court of the United States.

Dated this 29th day of April, 1907.

WILLIAM H. HUNT, *Judge.*

85 Endorsed: Title of court and causes: Order fixing amount of Bond on writ of error. Filed and entered Apr. 29th, 1907. Geo. W. Sproule, Clerk By F. H. Drake, Deputy Clerk.

86 And thereafter to-wit on the 29th day of April, 1907, a certificate to the Supreme Court of the United States was filed herein which is entered of record as follows, to-wit:

87 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Certificate of Question of Jurisdiction on Writ of Error in the Circuit Court of the United States, Ninth Circuit, District of Montana, to the Supreme Court of the United States.

The plaintiff having begun this action in this court by filing its complaint herein, and the defendant having filed its demurrer to the said complaint; and the said demurrer having been overruled upon the first three grounds set out therein and sustained upon the ground that the said complaint is uncertain; and said plaintiff having filed its amended complaint herein and subsequently having filed its second amended complaint herein; and the said defendant having filed its demurrer to the said second amended complaint; and the said demurrer having been sustained upon the ground that the said court has no jurisdiction of the cause; and the said cause having been ordered dismissed by this court; and a judgment of dismissal having been duly made and entered herein for the
88 reason and upon the ground that the court has no jurisdiction of the said action upon the facts alleged in the plaintiff's complaint notwithstanding the filing of the said general demurrers herein; and said plaintiff being desirous of suing out a writ of error from the judgment of this court dismissing the said suit and entering a dismissal thereof, and having this day applied to this court for a certificate as required by law in such cases; the court hereby certifies to the Supreme Court of the United States for a decision upon the following question of jurisdiction which has arisen upon the decision of the said demurrer, whether or not the said court has jurisdiction of said case:

The complaint in said action, filed herein January 7th, 1903, is in words and figures as follows:

89 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is now and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws

of the State of Utah and a resident and citizen of the said State, and the defendant is now and was at all times herein mentioned, from and after the 25th day of February, 1897, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is and was, at all such times, a citizen of said State, and the said defendant corporation has at all times from and since the said date, conducted and carried on business in Silver Bow County, Montana, and has by instrument in writing under its corporate seal in due form of law filed in the office of the County Clerk and Recorder of Silver Bow County, Montana, on or about the 15th day of March, 1897, duly consented to be sued in the court of the said State of Montana and has designated an agent, a resident of Silver Bow County, Montana, upon whom the said defendant corporation has consented that service of process may be made
90 as the agent of said corporation. The matter in dispute herein exceeds exclusive of interest and costs the sum of Two Thousand ($2000) Dollars.

II.

That on or about the 15th day of June, 1867, William Birdsell, with the intention on his part to claim the land hereinafter described as a homestead and procuring title thereto under the homestead laws of the United States, settled upon, improved and cultivated, and at all times herein mentioned thereafter, to and until the 20th day of June, 1883, continued to occupy and cultivate with such intention, the following described real property, then situated in Deer Lodge County, Territory of Montana, which said property was, on the said 15th day of June, 1867, a part of the unappropriated and unoccupied public lands of the United States, to-wit:

The east one-half (½) of the South-east one fourth (¼) of Section 15, and the North half (½) of the Northeast quarter (¼) of section 22, all in township 3 north range 9 west of Montana principal meridian, in Silver Bow County, State of Montana.

The said William Birdsell, on the 1st day of September, 1877, filed in the United States Land Office at Helena, Montana, his declaratory statement claiming the said land as a homestead; that he made his final proof upon the said land on the 7th day of May, 1880, and received a patent therefor on or about the 20th day of June, 1883. At the time the said William Birdsell became the owner of the said above described real property, waters of Silver Bow Creek flowed upon and across the same, and that the said William Birdsell, as the owner of such real property, became the owner of the right to have the waters of the said stream to continue to
91 so flow in the natural course of such stream across the said land and without a diminution in quantity or a deterioration in quality. The said William Birdsell resided upon, used and occupied such land continuously from said 15th day of June, 1867, to and until on or about the 30th day of December, 1887.

III.

That the plaintiff became the owner of an equitable interest in the said above described real property, with all of the incidents attached thereto, including the rights of the said William Birdsell in and to the waters of the Silver Bow Creek, on or about the 5th day of June, 1889; that said equitable interest of the said plaintiff consisted of a mortgage upon the said above described real property.

That the plaintiff continued to be the owner of such interest in said property to and until on or about the 29th day of April, 1901, when the plaintiff became the owner of the full legal title in and to the said above described real property which said title the said plaintiff has ever since continued to hold and now holds and is the owner of and in the possession of the said above described real property.

IV.

That on or about the 25th day of February, 1897, said defendant began the business in Silver Bow County, Montana, of smelting and milling mineral bearing ores and for that purpose operated a mill and smelter situated upon a bank and near the said Silver Bow Creek at a point several miles above the said stream from the place where the said stream entered upon the land of the said William Birdsell.

That the said defendant has ever since and is now carrying on said business and has ever since, and is now, operating the said mill and smelter at the said place; that the said defendant in the operation of the said mill and smelter has used a portion of the water of the said Silver Bow Creek in the milling of ore treated in its
92 said mill and has caused the water so used and the water from said smelter and the tailings from the said mill to be thrown upon the bank of the said creek and into the said stream and has caused the water of the said stream to be filled with pulverized quartz and other debris and has caused such water to become impregnated with copper, sulphur and other injurious and poisonous substances; that the pulverized quartz and other debris so deposited upon the bank of said stream and in the said stream by the defendant has been carried and washed downward by the natural flow of said stream and has been deposited upon the said above described real property; that the said deposit of the said pulverized quartz and other debris has filled up the bed or natural channel of the said Silver Bow Creek and has caused the said stream to overflow its said banks and to spread over a large portion of the said land and has thereby caused such land to become mirey and has caused a deposit of said pulverized quartz and tailings and other debris over a large portion of said land to a depth of several inches.

93 V.

That the said land at all times from and since the said settlement and occupancy of the same has been used as a cattle ranch. The water of said stream has at all times been used for the purpose of watering stock and for other useful purposes in connection with the said ranch; that a portion only of said land is fit for, or can be used

for the purpose of growing hay or any other crop, that the remainder of the said land is fit for or can be used only as grazing land; that at the time the plaintiff became the owner of the said land there were certain valuable improvements situated thereon consisting of fencing buildings, etc. That the plaintiff has always owned in connection with such ranch, certain water-rights, to-wit:

That certain water right located by William Birdsell on the 17th day of January, 1877, and recorded in Volume "F," page 389 of Miscellaneous Records of Deer Lodge County, Montana, to which records reference is hereby made for a more particular description of said water-right; that that portion of said land which could be used for the growing of hay or any other crop, is situated along and near the said stream, flowing in its natural channel upon and across the said land, That by the diversion of the said stream and the deposit of such pulverized and other debris upon the said land, nearly all of the said land, which might be used for growing hay and other crops, has been rendered entirely useless for that purpose or for any other purpose; that the pulverized quartz deposited upon the said land, renders the soil of such a character that no crop can be grown thereon; that by the impregnation of the waters of said stream with copper, sulphur and other poisonous substances, the same is rendered of such a character that it not only destroys all vegetation, but is poisonous and injurious to animals of any kind which may drink the same, and that by the diversion of the course of the said stream and the flowing of the said land, the same is rendered soft and of such a character that a machine cannot be run upon such land and no crop of any kind could be harvested if one were grown thereon. That the said grazing land as a part of said ranch and the buildings, fences, and other improvements thereon and the said water-right, are of very little value without the said hay land belonging to and forming a part of the said ranch; and that the injury to the said hay land, above described has rendered all of the said land and the said improvements and water-right, of very little value and the plaintiff has suffered damages by reason of the depreciation in value of the said improvements and grazing land and water right, because of the injury to the remainder of the land belonging to the said ranch, in the sum of five hundred ($500.00) dollars.

94

VI.

That all of the rights acquired by the said William Birdsell in and to the said waters of the said stream, have passed to the said plaintiff by mesne conveyances of the land through which the same flows. The plaintiff is now the holder of the same and all of the same; that at the time the said William Birdsell acquired such rights in the said stream, the said defendant, and his predecessors in interest, had no right in any of the waters of the said stream by appropriation or otherwise, and that if the defendant has acquired any such right whatever, the same was acquired long subsequent to the acquisition of said rights by the said William Birdsell.

VII.

That the said process of depositing of the said pulverized quartz and other debris upon the said land and the impregnation of the waters of said stream with said sulphur, copper and other poisonous substances and the diversion of the course of the said stream and the flowing of the said land has been caused to be carried on continuously by the said defendant at all times from and since the said 25th day of February, 1897, to and until the present time; that the said defendant now continues to carry on such process and to cause such injury to continue to result to the land and property of the said plaintiff.

That the acts of the defendant complained of have caused the water of said Silver Bow Creek to become polluted in the manner stated throughout the entire course of said stream below the said mill and smelter and have in like manner caused the waters of Deer Lodge River to become polluted for many miles below the inflow of said Silver Bow Creek in the said River, and such water for a distance of forty miles below said mill and smelter is thereby
95 rendered almost useless for irrigation or any other useful purpose; that said acts of defendant have, in a similar manner, injured other ranches situated along said streams for said distance and belonging to a large number of different owners; and the said acts complained of affect at the same time an entire community and neighborhood and a considerable number of persons, and constitute a public nuisance.

That said acts complained of are specially injurious to plaintiff in the manner above set forth. That plaintiff, or its predecessors in interest, have never acquiesced in the commission of said acts by defendant, but have at all times protested against the same.

VIII.

Plaintiff has suffered damages in the premises in the sum of three thousand ($3000.00) dollars.

Wherefore; plaintiff prays Judgment against the defendant in the sum of three thousand ($3000.00) dollars and costs of suit.

JOHN A. SHELTON,
Attorney for Plaintiff.

96 STATE OF MONTANA, *County of Silver Bow*, ss:

John A. Shelton, being first duly sworn deposes and says that he is attorney for the plaintiff above named, and as such, makes this verification, that the reason this verification is made by affiant and not by some officer of the plaintiff corporation is, that all of such officers are absent from the said County of Silver Bow, wherein resides the said attorney; that he has read the above and foregoing complaint and knows the contents thereof and the matters therein stated are true to his best knowledge, information and belief.

JOHN A. SHELTON.

Subscribed and sworn to before me this 6th day of January 1903.

JOHN N. KIRK,
Notary Public in and for Silver Bow County, State of Montana.

Endorsed: Title of court and cause Complaint Filed and entered Jan. 7 1903 Geo. W. Sproule, Clerk By T. B. Stephens, Deputy Clerk.

97 The demurrer to said complaint, filed herein January 26th, 1903, is in words and figures as follows, to-wit:

98 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 201.

WESTERN LOAN & SAVINGS COMPANY, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Demurrer.

Now comes the Butte and Boston Consolidated Mining Company, defendant in the above action, and demurs to plaintiff's complaint, on file herein, for the reasons and upon the grounds as follows, to-wit:

1. That the Court has no jurisdiction of the subject of the action.
2. That the Court has no jurisdiction of the person of the defendant.
3. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.
4. That said complaint is uncertain in this, to-wit:

(*a*) That by the said complaint, plaintiff is seeking to recover damages for the deterioration of the quality and quantity of the waters of Silver Bow Creek, flowing through the lands claimed by plaintiff; also for the deterioration in and injury to the water claimed to have been appropriated by plaintiff for irrigating and other useful purposes; also for injury to certain of plaintiff's lands, caused by the deposit thereon of tailings, and other debris; also for injury to certain lands claimed by plaintiff, by the overflowing of the same, and changing the original channel; of Silver Bow Creek through the same; also for injury and damages sustained by the loss of
99 the annual crops which might have been grown upon this land; also for damages to ditches claimed by the plaintiff, by the filling up and destroying of the same; also for damages claimed to have been sustained by plaintiff by the pollution of the waters of Silver Bow Creek and Deer Lodge River. And that it cannot be ascertained from said complaint what damages, if any, plaintiff claims to have sustained on account of either or any of

said sources of damage, separately; said complaint alleging that plaintiff has sustained damages in one sum for all of said elements of injury and damage together; and that it is impossible to arrive at the amount of damages which plaintiff claims to have sustained without having the separate items upon which the general claim of damage is based.

(*b*) By the said complaint plaintiff is seeking to recover special damages in the sum of Five Hundred Dollars, for the rendering valueless, or of less value, certain improvements and grazing lands claimed by plaintiff by reason of the fact that other lands connected therewith have been directly injured by the acts of the defendant, and it does not appear from, and cannot be ascertained from said complaint what improvements, if any, have been so injured or where the same are situated, or what grazing land has been so injured or damaged, or any description of said grazing land, or of the quantity or amount thereof.

(*c*) That said complaint is uncertain in that it cannot be ascertained therefrom whether plaintiff is asking judgment for the sum of Three Thousand Dollars, altogether, or whether plaintiff is seeking a judgment in the sum of Five hundred dollars for special damages in addition to the sum of Three thousand dollars.

5. That said complaint is unintelligible, in the same respects as the same is hereinbefore alleged to be uncertain.

100 FORBIS & EVANS,
Attorneys for Defendant.

I, L. O. Evans, one of the attorneys for and of counsel for defendant in the above action, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of Law.

L. O. EVANS,
Attorney for and of Counsel for Defendant.

Service of the foregoing demurrer, by copy, is hereby accepted this — day of January, 1903.

——— ———,
Attorney for Plaintiffs.

101 Said demurrer was overruled as to the first, second and third grounds thereof, by order filed herein November 7th, 1903, and by the same order was sustained upon the ground that said complaint is uncertain and unintelligible.

The second amended complaint filed herein March 3, 1904, is in words and figures as follows, to-wit:

102 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Amended Complaint.

Comes now the plaintiff in the above entitled action and after leave of court, first had and obtained, files this its amended complaint against the defendant, and for cause of action alleges:

I.

That plaintiff is now and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Utah and a resident and citizen of said State. That the defendant is now and was at all times herein mentioned, from and after the 25th day of February, 1897, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is and was, at all such times, a citizen of said State, and the said defendant corporation has at all times from and since the said date, conducted and carried on business in Silver Bow County, Montana, and has by instrument in writing under its corporate seal in due form of law filed in the office of the County Clerk and Recorder of Silver Bow County, Montana, duly consented to be sued in the courts of the said State of Montana and has designated an agent, a resident of Silver Bow County, Montana, upon whom the said defendant corporation has consented that service of pro-
103 cess may be made as the agent of said corporation. That the matter in dispute herein exceeds exclusive of interest and costs the sum of or value of Two Thousand ($2000) Dollars.

II.

That on or about the 15th day of June, 1867, William Birdsell, who was then a citizen of the United States, with the intention on his part to claim the land hereinafter described as a homestead and procuring title thereto under the homestead laws of the United States, settled upon, improved and cultivated, and at all times herein mentioned thereafter, to and until the 20th day of June, 1883, continued to occupy and cultivate with such intention, the following described real property, then situated in Deer Lodge County, Territory of Montana, which said property was, on the 15th day of June, 1867, a part of the unappropriated and unoccupied public lands of the United States, to-wit:

The east one-half (½) of the South-east one fourth (¼) of Section 15, and the North half (½) of the north-east quarter (¼) of section 22, all in township 3 north range 9 west of Montana principal meridian, in Silver Bow County, State of Montana.

The said William Birdsell, on the 1st day of September, 1877, filed in the United States Land office at Helena, Montana, his declaratory statement claiming said land as a homestead; that he made his final proof upon the said land on the 7th day of May, 1880, and received a patent therefor on or about the 20th day of June, 1883. At the time the said William Birdsell became the owner of the said above described real property, waters of Silver Bow Creek flowed upon and across the same, and that the said William Birdsell, as the owner of such real property, became the owner of the right to have the
104 waters of the said stream to continue to so flow in the natural course of such stream across the said land, and without diminution in quantity or a deterioration in quality. The said William Birdsell resided upon, used and occupied such land continuously from said 15th day of June, 1867, to and until on or about the 30th day of December, 1887.

105 III.

That one George A. McDonald became the owner of the said real property by mesne conveyances from the said William Birdsell together with a certain water right owned and used in connection therewith, the same having been located by the said William Birdsell on the 17th day of January, 1877, and recorded in volume "F" at page 289 of Miscellaneous Records of Deer Lodge County, Montana, to which records reference is hereby made for a more particular description of said water right; that he was such owner on the 5th day of June, 1899. That on or about the 10th day of May, 1899, the said George A. McDonald made application to the said plaintiff for a loan of Four thousand dollars ($4000) and offered as security for such loan a mortgage upon the said above described real property and water right; that the said plaintiff accepted the said application for a loan and loaned to the said George A. McDonald the said sum of Four Thousand Dollars, and received therefor his promissory note to re-pay the same with interest thereon at the rate of Forty-two ($42.00) dollars per month, which said promissory note was also signed by Jennie McDonald, wife of the said George A. McDonald. That the said George A. McDonald and Jennie McDonald in order to secure the payment of the said promissory note, made, executed and delivered to the plaintiff their certain mortgage in due form of law upon the said above described real estate and water-right; that the said promissory note or any part of the same has never been paid by the said George A. McDonald or Jennie McDonald. That the said plaintiff has procured a foreclosure of the said mortgage according to law after the said promissory note became entirely due and payable. That the said property and water-right was sold under an order of sale issued in the said foreclosure proceedings on or about the 29th day of April, 1900. That the said plaintiff became
106 the purchaser of said property at said sale. That there was no redemption of the said property from the said sale. That the said plaintiff received a deed for the said property under and in accordance with the provisions of the said order of sale on or about the 29th day of April, 1901. That at the sale of the said property

the highest bid made therefor, excepting the bid of this plaintiff, was the sum of Three Thousand ($3000.00) dollars; that the sum of Three Thousand Dollars was the full value of the said property at the time of the said sale.

IV.

That on or about the 25th day of February, 1897, said defendant began the business in Silver Bow County, Montana, of milling and smelting mineral bearing ores, and for that purpose operated a mill and smelter situated upon the bank of and near the said Silver Bow Creek, at a point several miles above the point where the said stream entered upon the said above described real estate; that the said defendant was in the operation of the said mill and Smelter at all times subsequent to the 5th day of June, 1899, and prior to the 29th day of April, 1901. That the said defendant, in the operation of the said mill and smelter during the said time, used a portion of the water of the said Silver Bow Creek, which said water was used in the treatment of the said ores in its said mill and smelter, which said water, so used in the treatment of said ores, together with the tailings of the said mill, were thrown and deposited upon the bank of the said creek and into the said stream, thereby causing the waters of the said stream to be filled with pulverised quartz and other
107 debris, and to become impregnated with copper, sulphur, antimony, arsenic and other injurious and poisonous substances. That the pulverized quartz and other debris so deposited on the banks of the said stream and in the said stream was carried downward, during the said period, by the natural flow of said stream and was deposited upon the said above described real estate, and filled up the bed or natural channel of the said stream and caused the same to overflow its banks and to spead over a large portion of the land above described, depositing thereon a layer of pulverized quartz tailing, and other debris, causing the same to become mirey and unfit for agricultural purposes or other purposes and to become impregnated with copper, sulphur, antimony, arsenic and other poisonous substances; so carried downward by the flow of said stream, from defendants' said mill and concentrator.

That the said land consists of 160 acres, more or less, all of which land is useful only for agricultural and grazing purposes, and that none of said land is useful for agricultural purposes except when irrigated. That a portion of said land consisting of about 30 acres, has been at all times herein mentioned, irrigated by water taken from a spring situated above said land, and described in the said water-right. That about 60 acres of said tract is situated along and near the bed of the said Silver Bow Creek the water of the said Silver Bow Creek sinking naturally into said land are sufficient to irrigate said land. The remainder of said tract, consisting of 70 acres is useful, only for grazing purposes. That the said land, and the whole thereof, has always been used as a stock ranch and dairy farm. That on the 5th day of June, 1899, the said real property had been improved by fencing the same, and by placing buildings thereon suitable for a stock ranch and dairy farm. The said build-

ings were situated upon the said tract of 30 acres, above mentioned.

That on the 5th day of June, 1899, the said land and water
108 right, with the improvements thereon, were of the reasonable market value of Six thousand ($6000.00) dollars. That the amount of the said indebtedness, with the interest thereon, costs of foreclosure, together with the taxes and other expenses required to be paid by the said plaintiff in order to protect its said security, amounted to the full sum of Six Thousand ($6000.00) dollars, at the time it received the said deed for said real property.

That the said George A. McDonald and Jennie McDonald, were wholly and hopelessly insolvent on the 5th day of June, 1899, and have been wholly and hopelessly insolvent at all times subsequent thereto; and the said parties, or either of them have never, at any time subsequent to said date, owned any property out of which any deficiency judgment, obtained in the said foreclosure proceeding, could be satisfied.

That the plaintiff herein has suffered damages, because of the acts of the defendant above set forth, in the sum of three thousand ($3000.00) dollars.

That the said tract of 60 acres above mentioned, on the said 5th day of June, 1899, was useful for agricultural purposes. That during the said period, from the 5th day of June, 1899, to and until the 29th day of April, 1901, the same was *depricated* in value by the acts of the defendant above set forth, in the sum of Two Thousand ($2,000.00) dollars. That during the same period the whole of said real property was *depricated* in value, on account of the pollution of the waters of said stream, independently of any injury to the land itself, in the sum of five hundred ($500.00) dollars. That the improvements placed upon the said real property and the said tract of 70 acres of grazing land and the said tract of 30 acres of irrigable land, are less valuable, because of the injury to the said tract of 60 acres, because of the fact that the same are useful only when in connection with a sufficient quantity of agricultural land to furnish feed for stock kept upon said ranch, and in connection therewith; and that said improvements and the said tract of 70 acres of grazing land were *depricated* in value during the said period in the sum of Five Hundred ($500.00) dollars, because of the said injury to the said tract of 60 acres.

109 VI.

That the said process of depositing of the said pulverized quartz and other debris upon the said land, and the impregnation of the waters of the said stream with such poisonous substances and the diversion of the course of said stream and the overflowing of said land has been caused to be carried on continuously by said defendant at all times from and since the 25th day of February, 1897, and the said defendant now continues to carry on such process and to cause such injury to continue to result to the said land. That the acts of the said defendant, complained of, have caused the waters of said Silver Bow Creek to become polluted in the manner stated through-

out the entire course of said stream below the said mill and smelter, and have in like manner caused the waters of Deer Lodge River to become polluted for many miles below the inflow of said Silver Bow Creek into the said river, and such water for a distance of 40 miles below the said mill and smelter is rendered almost useless for irrigation or other useful purposes; and that said acts of defendant have in a similar manner injured other ranches situated along said stream for said distance and belonging to a large number of different owners. That the said acts complained of affect at the same time an entire community and neighborhood and a considerable number of persons and constitutes a public nuisance. That the plaintiff or its predecessors in interest have never acquiesced in the commission of said acts by the defendant, but have at all times protested against the same.

110 Wherefore, plaintiff prays judgment against the defendant in the sum of Three Thousand ($3,000.00) Dollars, and costs of suit.

111 For a further and separate cause of action against defendant, plaintiff alleges:

First.

That the Plaintiff is now and at all times herein mentioned was, a corporation duly organized under and by virtue of the laws of the State of Utah and a resident and citizen of that State, and the defendant is now and at all times herein mentioned was, from and after the 25th day of February, 1897, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is and was, at all such times, a citizen of said State, and said defendant, a corporation, has at all times since said date, conducted and carried on business in Silver Bow County, Montana, and has by instrument in writing under its corporate seal in due form of law filed in the office of the County Clerk and Recorder of Silver County, Montana, duly consented to be sued in the courts of the State of Montana and has designated an agent, a resident of Silver Bow County, Montana, upon whom the said defendant corporation has consented that service of process may be made as the agent

112 of said corporation. That the matter in dispute herein exceeds exclusive of interest and costs the sum of or value of Two Thousand ($2000) Dollars.

II.

That on or about the 15th day of June, 1867, William Birdsell, who was then a citizen of the United States, with the intention on his part to claim the land hereinafter described as a homestead and procuring title thereto under the homestead laws of the United States, settled upon, improved and cultivated, and at all times herein mentioned thereafter, to and until the 20th day of June, 1883, continued to occupy and cultivate with such intention, the following described real property, then situated in Deer Lodge County, Territory of Montana, which said property was, on the said 15th day

of June, 1867, a part of the unappropriated and unoccupied public lands of the United States, to-wit:

The east one-half (½) of the South-east one fourth (¼) of Section 15, and the North half (½) of the North-east quarter (¼) of section 22, all in township 3 north range 9 west of Montana principal meridian, in Silver Bow County, State of Montana.

The said William Birdsell, on the 1st day of September, 1877, filed in the United States Land Office at Helena, Montana, his declaratory statement claiming the said land as a homestead; that he made his final proof upon the said land on the 7th day of May, 1880, and received a patent therefor on or about the 20th day of June, 1883. At the time the said William Birdsell became the owner of the said above described real property, waters of Silver Bow Creek flowed upon and across the same, and that the said William Birdsell as the owner of such real property, became the owner of the right to have the waters of the said stream to continue to so flow
113 in the natural course of such stream across the said land and without diminution in quantity or a deterioration in quality. The said William Birdsell resided upon, used and occupied such land continuously from said 15th day of June, 1867, to and until on or about the 30th day of December, 1887.

Third.

That on or about the 29th day of April, 1901, plaintiff became the owner, by mesne conveyance from the said William Birdsell, of the said above described real property, together with a certain water-right located by the said William Birdsell on or about the 17th day of January, 1877, and recorded in Volume "F" at page 389 of Miscellaneous Records of Deer Lodge County, Montana, to which records reference is hereby made for a more particular description of said water-right and plaintiff has ever since been the owner of such property.

Fourth.

That on or about the 25th day of February, 1897, said defendant began the business in Silver Bow County, Montana, of Milling and smelting mineral bearing ores, and for that purpose operated a mill and smelter situated upon the bank of and near the said Silver Bow Creek, at a point several miles above the point where the said stream entered upon the said above described land, and said defendant has ever since and is now carrying on the said business, and has ever since and is now operating the said mill and smelter at the said place. That the said defendant in the operation of the said mill and smelter has, at all of said times, used a portion of the water of said Silver Bow Creek in the milling of said ores and in the concentration of the same has caused the water so used and the tailings from said
114 mill to be thrown upon the bank of the said creek and into said stream, and has thereby caused the waters of said stream to be filled with pulverized quartz and other debris, and to become impregnated with copper, sulphur antimony, arsenic and other

poisonous substances, and that such debris and such injurious and poisonous substances have been carried and washed downward by the natural flow of said stream, and have filled up the bed thereof and have caused the said stream to overflow its banks and overflow a large portion of the said land, and has deposited thereon a layer of pulverized quartz and other debris and have caused the said water to become impregnated with the said injurious and poisonous substances, and have caused the said land to become mirey and unfit for agricultural purposes.

Fifth.

That the said tract of land, consists of 160 acres, more or less; that said land has always been used as a stock ranch and dairy farm. Such land is useful only for agricultural and grazing purposes, and that it is useful for such purposes only when irrigated; that crops cannot be grown upon said land or any of the same except when watered in some other manner than the natural rain-fall. That 30 acres of said tract can be watered by water taken from a spring situated above said land; that 60 acres of the said tract can be watered only by water coming from the said Silver Bow Creek, and that such tract has always been watered by such water sinking, naturally into the land. That the said land has been improved by the erection of buildings thereon, which said buildings are situated upon the said tract of 30 acres, and are useful for the purpose of a dairy farm and stock ranch. That by the acts of the said defendant, as aforesaid, said tract of 60 acres has been lessened in value since the 29th day of April, 1901, in the sum of twelve hundred and fifty ($1,250.00) Dollars; that during the same period the said improvements and
115 said tract of 30 acres and an additional tract of 70 acres of grazing land forming the balance of said tract of 160 acres of land have been lessened in value to the extent of Seven hundred and fifty ($750.00) dollars, because of the fact of the injury to said tract of 60 acres of land, because of the fact that such grazing land and improvements are useful only when used in connection with a sufficient amount of agricultural land to grow crops to be used as feed for cattle and stock kept in connection with said land.

Plaintiff has suffered damages herein for acts done by the *plaintiff* since the 29th day of April, 1901, in the sum of two thousand Dollars.

116 VI.

That the process of depositing of the said pulverized quartz and other debris upon the said land, and the impregnation of the waters of the said stream with copper, sulphur, antimony, arsenic, and other poisonous substances and the diversion of the course of said stream and the overflowing of said land has caused to be carried on continuously by the said defendant at all times from and since the 25th day of February, 1897, and the said defendant now continues to carry on such process and to cause such injury to continue to result to the said land and property. That the acts of the defendant, complained of, have caused the waters of said Silver Bow Creek to become polluted in the manner stated throughout the entire course of said

stream below the said mill and smelter, and have in like manner caused the waters of Deer Lodge River to become polluted for many miles below the inflow of said Creek into the said river, and the said creek for many miles below the said mill and smelter is rendered almost useless for irrigation or any other useful purposes; that said acts of defendant have in a similar manner injured other ranches situated along said stream for said distance and belonging to a number of different owners. That the said acts complained of affect at the same time an entire community and neighborhood and a considerable number of persons and constitutes a public nuisance. That the plaintiff or its predecessors in interest have never acquiesced in the commission of said acts, but have at all times protested against the same.

117 Wherefore, plaintiff prays judgment against the defendant in the sum of Two thousand ($2000.00) Dollars, and costs of suit.

JOHN A. SHELTON,
Attorney for Plaintiff.

118 STATE OF MONTANA, *County of Silver Bow, ss:*

John A. Shelton, being duly sworn deposes and says that he is the attorney for the plaintiff in the above entitled action, and makes this verification on its behalf: that the reason this verification is made by affiant and not by some officer of the plaintiff corporation is, that all of such officers are absent from the County of Silver Bow, State of Montana, wherein resides the said attorney; that he has read the above and foregoing amended complaint and knows the contents thereof and that the matters therein stated are true to the best of his knowledge, information and belief.

JOHN A. SHELTON.

Subscribed and sworn to before me this 3rd day of March 1904.

[SEAL.] ROBERT L. CLINTON,
Notary Public in and for Silver Bow County, State of Montana.

Service admitted and copy received this 3rd day of March, 1904.

W. W. DIXON,
A. J. SHORES, &
C. F. KELLEY,
Att'ys for Def.

Endorsed: Title of court and cause Amended Complaint Filed and entered Mar. 3, 1904 Geo. W. Sproule, Clerk By F. H. Drake, Deputy Clerk.

119 To the second amended complaint the defendant filed a demurrer herein on March 22d, 1904 which is in words and figures as follows, to-wit:

120 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 201.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Demurrer to Second Amended Complaint.

Comes now the above named defendant and demurs to the second amended complaint of plaintiff, filed herein, upon the following grounds and for the following reasons, to-wit:

1. That the court has no jurisdiction over the subject matter of the action.

2. That the court has no jurisdiction over the person of the defendant.

3. That the said second amended complaint does not state facts sufficient to constitute a cause of action.

4. That the said second amended complaint is uncertain in this, to-wit, plaintiff alleges that it became the owner of an equitable interest in said property through a mortgage executed to plaintiff by George A. McDonald and Jennie McDonald, his wife, including all the rights which the said Birdsell originally had in and to the waters of Silver Bow Creek; and further alleges that it did not become the owner of the legal title in and to the property described in said second amended complaint until on or about the 29th day of April, 1901. Plaintiff further alleges that all of the acts which
121 were suffered to be done or were committed by the defendant began on or about the first day of January, 1884, and continued until the 29th day of April, 1901; and that all of said acts have been continued until the present time. And defendant alleges that it cannot be ascertained from said second amended complaint whether plaintiff is seeking to recover damages for injuries done to the equitable interest or title which plaintiff had in and to said property, or whether plaintiff is seeking to recover for damage caused to said property subsequent to said time when plaintiff became the owner of said legal title; nor can it be ascertained how or in what manner, if at all, the plaintiff was damaged prior to the time that it acquired any interest in the property.

(*b*) Said amended complaint is uncertain in that it cannot be ascertained therefrom what, if any, acts of the defendant resulted in damage to the plaintiff or to the real property described in said second amended complaint.

(*c*) Said second amended complaint is also uncertain in that it cannot be ascertained therefrom whether the plaintiff is seeking to recover for injuries to the real property described in the said second amended complaint or for injuries to the water right alleged to be

owned by the plaintiff, or for injuries to the right of plaintiff to have the waters of Silver Bow Creek flow upon its premises undiminished in quantity or undeteriorated in quality.

(*d*) Said amended complaint is also uncertain in that it cannot be ascertained therefrom what elements of damage go to make up plaintiff's claim, and that it cannot be ascertained from said second amended complaint whether plaintiff attempts a recovery of alleged damage done to the described 50 acres of real property and to the betterments and improvements on the 30 acres described in
122 said second amended complaint, or whether plaintiff seeks to recover for damages done directly to the 50 acres and consequently to the 30 acres, and the remainder of said real property.

5. That said second amended complaint is ambiguous for the same reasons that it is uncertain.

6. That said second amended complaint is unintelligible for the same reasons that it is ambiguous and uncertain.

Second.

Because there has been a misjoinder of causes of action.

A. J. SHORES,
FORBIS & EVANS, &
C. F. KELLEY,
Attorneys for Defendant.

I, C. F. Kelley, one of the attorneys for and of counsel for defendant in the above action, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

C. F. KELLEY,
Attorney for and of Counsel for Defendant.

Service of the foregoing demurrer admitted, and capy received,
Service of the foregoing demurrer admitted, and copy received, this 22nd day of March, A. D. 1904.

JOHN A. SHELTON,
Attorney for Plaintiff.

123 The said demurrer was argued and submitted to the court on the first and second grounds specified therein, and the said demurrer was sustained on the said grounds, and an order made dismissing the said case for lack of jurisdiction.

The court further certifies that the amount involved in the said controversy, as shown by the said complaint, was and is in excess of $2,000.00, exclusive of interest and costs.

Done this 29th day of April, 1907.

WILLIAM H. HUNT,
Judge of said Court.

Endorsed: Title of Court and cause: Certificate of question of Jurisdiction on writ of error in the Circuit Court of the United States, Ninth Circuit District of Montana, to the Supreme Court of the United States. Filed and entered Ap'l 29th, 1907 Geo. W. Sproule, Clerk by F. H. Drake, Deputy Clerk.

124 And thereafter to-wit on the 29th day of April, 1907 a bond on writ of error was filed herein which is entered of record as follows, to-wit:

125 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff,
vs.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Bond on Writ of Error.

Know all men by these presents: That we, the United States Fidelity & Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed and authorized to furnish bonds in judicial proceedings in the State of Montana, are held and firmly bound unto the defendant above named in the penal sum of $500.00, for the payment of which sum, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

The condition of the foregoing obligation is such that whereas the above named plaintiff has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the District of Montana:

Now, Therefore, if the above named plaintiff, Western Loan & Savings Company, shall prosecute such writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

126 In Testimony Whereof, We have hereunto caused our corporate name to be signed and our corporate seal to be hereunto affixed at Butte, Montana, this 29th day of April, 1907.

UNITED STATES FIDELITY & GUARANTY CO.,
By E. A. MORLEY,
Its Attorney in Fact.
By ELLA KNOWLES HASKELL,
Its Attorney in Fact.

Endorsed: Title of court and cause Bond on writ of error The within bond approved this — day of April, 1907. Wm. H. Hunt, Judge Filed and entered Apr. 29, 1907 Geo. W. Sproule, Clerk by F. H. Drake, Deputy Clerk.

127 And thereafter to-wit on the 29th day of April, 1907 Citation duly issued herein which said Citation is hereto Annexed:

128 *Citation.*

The President of the United States of America to Butte & Boston Consolidated Mining Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, within 60 days from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the District of Montana, wherein Western Loan & Savings Company, a corporation, is the plaintiff, and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Hunt, Judge of the District Court of the United States, and presiding in the Circuit Court of the United States for the District of Montana, this the 29th day of April, 1907, and of the Independence of the United States the One Hundred and Thirty-second.

WILLIAM H. HUNT,
United States District Judge presiding in the United States Circuit Court for the District of Montana.

Due service of the above and foregoing citation in writ of error by copy thereof, admitted this 30th day of April, 1907.

FORBIS & EVANS,
Attorneys for Defendant.

129 [Endorsed:] Citation. Filed and Entered Apr. 30, 1907. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy.

130 And thereafter, to-wit, on the 24th day of May, A. D. 1907, a Writ of Error was duly issued herein, being in the words and figures following, to-wit:

131 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, Ninth Circuit, District of Montana, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between Western Loan & Savings Company, a corporation, plaintiff, and Butte & Boston Consolidated Mining Company, a corporation, Defendant, a manifest error has happened to the great prejudice and damage of the plaintiff, Western Loan & Savings Company, as is said and appears by the petition herein; we being willing that error, if any hath been done, shall be duly corrected and full and speedy

justice done to the parties aforesaid, in this behalf command you, if judgment be given therein, that then under your seal distinctly and openly you send the record and proceedings aforesaid and all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court of the United States on or before 60 days from and after the 29th day of April, 1907; that the records and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 24th day of May, 1907.

Attest my hand and the seal of the United States Circuit Court for the District of Montana, at the Clerk's Office at Butte, Montana, State of Montana, on the day and year last above written.

132 GEO. W. SPROULE,
Clerk of United States Circuit Court for the District of Montana,
By F. H. DRAKE,
Deputy Clerk.

[Seal United States Circuit Court. 1892.]

Due service of the above and foregoing Writ of Error, by copy thereof, admitted this 24th day of May, 1907.

FORBIS & EVANS,
Attorneys for Defendant.

The Answer of the Judges of the Circuit Court of the United States for the District of Montana.

The record and all proceedings of the plaintiff in error wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

GEO. W. SPROULE, *Clerk.*

133 [Endorsed:] In the Circuit Court of the United States, Ninth Circuit, District of Montana. Writ of Error. Filed and Entered May 24, 1907. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy.

134 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Montana, ss:*

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing volume consisting of 134 pages, numbered consecutively from 1 to 134, is a true and correct transcript of the pleadings, process, judgment, opinion, orders, certificate as to jurisdiction, and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said Court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Sixty three 15/100 Dollars, (63. 15/100), and have been paid by the Plaintiff in Error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court, Ninth Circuit, District of Montana, at Helena, Montana, this 24th day of May, A. D. 1907.

[Seal United States Circuit Court, District of Montana. 1890.]

GEO. W. SPROULE, *Clerk.*

135 In the Supreme Court of the United States.

WESTERN LOAN & SAVINGS COMPANY, a Corporation, Plaintiff in Error,

vs.

BUTTE & BOSTON CONSOLIDATED MINING COMPANY, a Corporation, Defendant in Error.

Statement of Plaintiff in Error as to the Errors on Which It Intends to Rely and the Parts of the Record Which It Thinks Necessary for the Consideration Thereof.

Comes now the plaintiff in error herein, and in accordance with the provisions of Rule 10, Sub-division 9, states that the following are the errors on which it intends to rely, to-wit:

First. The court erred in sustaining the demurrer of the defendant to the second amended complaint of the plaintiff on the first and second grounds thereof.

Second. The court erred in making its order that the said case be dismissed for lack of jurisdiction.

136 Third. The court erred in holding that it had no jurisdiction of the subject matter and parties in the above entitled action, and in dismissing the said case.

Fourth. The court erred in entering judgment of dismissal herein and in adjudging that the said cause be dismissed.

The said plaintiff in error also states that it thinks the portion of the transcript of record filed herein, as hereinafter specified, necessary for the consideration of such errors, to-wit: All that portion of the said transcript commencing with the beginning of page 69 of the said transcript as filed herein and concluding with page 129 of the said transcript as so filed, and including the following papers, to-wit: Memorandum of order overruling demurrer for lack of jurisdiction; memorandum of order sustaining demurrer for lack of jurisdiction; judgment of dismissal for lack of jurisdiction; assignment of errors; petition for writ of error and order allowing the same; order fixing amount of bond on writ of error; certificate of question of jurisdiction; bond on writ of error; citation, together with the certificate of the clerk of the said United States Circuit Court as to the filing of the said papers.

Also the writ of error annexed to the said transcript and the return thereon and this statement of errors on which plaintiff in error intends to rely and the parts of the record which it thinks necessary for a consideration thereof.

137 The papers (except as the same appear in the certificate of the question of jurisdiction) which the plaintiff in error thinks unnecessary for a consideration of the said errors, appear in the said transcript of record from pages 1 to 68 inclusive, and are as follows: Complaint, summons, demurrer to complaint, motion to strike from complaint, order overruling motion to strike and overruling demurrer as to the first three grounds and sustaining the demurrer upon the ground of uncertainty, first amended complaint, motion to strike from first amended complaint, demurrer to first amended complaint; order granting leave to file second amended complaint, second amended complaint, motion to strike from second amended complaint, demurrer to second amended complaint, and the certificate of the Clerk as to the filing of the said papers and the making of such orders.

JOHN A. SHELTON,
Attorney for Plaintiff in Error.

Comes now the defendant in error herein and admits service of the above and foregoing statement of errors on which plaintiff in error intends to rely and the parts of the record which it thinks necessary for a consideration thereof, on this 27th day of May, 1907, by copies thereof; and the said defendant in error hereby waives the right to designate in writing any additional parts of the record which the defendant in error may think material; and it hereby consents

138 to a hearing of the said cause on the parts designated by the plaintiff in error in the said statement, and consents that the record may be immediately printed containing only the parts so designated.

A. J. SHORES,
C. F. KELLEY,
JOHN F. FORBIS, AND
LEWIS O. EVANS,
Attorneys for Defendant in Error.

139 [Endorsed:] In the Supreme Court of the United States. Western Loan & Savings Company, a Corporation, Plaintiff in Error, *vs.* Butte & Boston Consolidated Mining Company, a Corporation, Defendant in Error. Statement of plaintiff in error as to the errors on which it intends to rely and the parts of the record which it thinks necessary for the consideration thereof.

140 [Endorsed:] File No. 20,754. Supreme Court U. S. October Term, 1907. Term No. 351. Western Loan & Savings Co., Pl'ff in Error *vs.* Butte & Boston Consolidated Mining Co. Specification of errors relied on and designation by counsel for plaintiff in error of parts of record to be printed and consent of counsel for the defendant in error. Filed June 6th, 1907.

Endorsed on cover: File No. 20,754. Montana, C. C. U. S. Term No. 351. Western Loan & Savings Company, plaintiff in error, *vs.* Butte & Boston Consolidated Mining Company. Filed June 6th, 1907. File No. 20,754.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

NO. 351

WESTERN LOAN & SAVINGS COMPANY,

Plaintiff in Error,

vs.

BUTTE & BOSTON CONSOLIDATED MINING COMPANY,

Defendant in Error.

Motion to Advance:

Comes now the plaintiff in error herein, the Western Loan & Savings Company, a corporation, and moves the court that the above entitled cause be advanced for hearing. This motion is made upon the ground and for the reason that this cause was brought into this court by Writ of Error from the United States Circuit Court for the District of Montana, under the provisions of Section 5 of Act of Congress of March 3, 1891, Chapter No. 517, a judgment having been rendered dismissing the said cause for an alleged lack of jurisdiction in the trial court, and the trial court having sustained a demurrer to the amended complaint of the plaintiff upon the ground that the court was without jurisdiction of the subject matter of the action or of the person of the defendant, and the question of jurisdiction alone having been certified for decision to this court by the trial court.

JOHN A. SHELTON,

Attorney for Plaintiff in Error.

Notice of Hearing of Above Entitled Motion:

To the Defendant in Error herein and to Messrs. A. J. Shores, C. F. Kelley, John F. Forbis, and Lewis O. Evans, its attorneys:

You and each of you will please take notice that the above and foregoing motion will be for hearing at the court room of the said court on Monday, the 20th day of April, 1908, at the hour of the opening of the court on the said day, or as soon thereafter as the matter can be heard.

JOHN A. SHELTON,

Attorney for Plaintiff in Error.

Due service of the above and foregoing motion and notice, by copy thereof, admitted, this 20th day of March, 1908.

A. J. Shores, C. F. Kelley

John F. Forbis and Lewis O. Evans

Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

WESTERN LOAN & SAVINGS COMPANY,
PLAINTIFF IN ERROR,

vs.

BUTTE & BOSTON CONSOLIDATED MINING
COMPANY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This is an action at law begun by plaintiff (plaintiff in error here) filing its complaint in the Circuit Court of the United States for the District of Montana (T 7-12). By said complaint it was made to appear that the plaintiff is a corporation organized under the laws of the State of Utah and the defendant is a corporation organized under the laws of the State of New York, and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $2,000 (T 7-8, 11).

The first appearance in this action upon the part of the defendant was made by the filing of a demurrer, the first three grounds of which were specified as follows:

"First: That the court has no jurisdiction of the sub-
"ject of the action.

"Second: That the court has no jurisdiction of the "person of the defendant.

"Third: That the said complaint does not state facts "sufficient to constitute a cause of action against the de- "fendant" (T 12-13, Index to transcript, page 1).

Said demurrer was overruled by the court upon all of the grounds mentioned above (T 13), but was sustained upon the ground that the complaint in certain respects was uncertain (T 13).

Thereafter the plaintiff filed its second amended complaint (T 14-21). To said second amended complaint defendant filed its demurrer upon the ground that the court had no jurisdiction of the subject matter or of the person of the defendant and upon the further ground that the said second amended complaint did not state facts sufficient to constitute a cause of action (T 22-23). Said demurrer was argued and submitted to the court on the ground that the court did not have jurisdiction of the subject matter or of the person of the defendant (T. 23). Whereupon the said Circuit Court rendered its decision overruling the said demurrer on the said ground and made an order that the said demurrer stand for hearing as to all other grounds of demurrer specified (T 1-2). Before any hearing was had upon said demurrer as to the other grounds specified, the court made an order reversing its former ruling and sustaining the demurrer upon the jurisdictional grounds (T 2).

Thereafter a judgment was entered by the Circuit Court, dismissing the action for want of jurisdiction (T 3), to review which judgment the plaintiff sued out a writ of error to this court and the Circuit Court certified to this court the single question of jurisdiction (T 4-23).

Specification of Errors Relied Upon.

First: The court erred in sustaining the demurrer of the defendant to the second amended complaint of the plaintiff on the first and second grounds specified in said demurrer.

Second: The court erred in making its order that the said case be dismissed for lack of jurisdiction.

Third: The court erred in holding that it had no jurisdiction of the subject matter or of the parties to the said action, and in dismissing the said case.

Fourth: The court erred in entering judgment of dismissal herein and adjudging that the said case should be dismissed for an alleged lack of jurisdiction.

Brief of Argument.

There is but one question for determination in this case and that is whether the trial court had jurisdiction. The first paragraph of the Act of Congress of March 3, 1887, as corrected by the act of August 13, 1888, reads as follows:

"The Circuit Courts of the United States shall have "original cognizance, concurrent with the courts of the "several states, of all suits of a civil nature, at common law "or in equity, where the matter in dispute exceeds, exclusive "of interest and costs, the sum or value of two thousand "dollars, and arising under the constitution or laws of the "United States, or treaties made, or which shall be made, "under their authority, or in which controversy the United "States are plaintiffs or petitioners, or in which there shall "be a controversy between citizens of different states, in "which the matter in dispute exceeds, exclusive of interest "and costs, the sum or value aforesaid, * * * * *."

Said section further provides as follows:

"No civil suit shall be brought before either of said "courts against any person by any original process or pro- "ceeding in any other district than that whereof he is an "inhabitant; but where the jurisdiction is founded only on "the fact that the action is between citizens of different "states, suit shall be brought only in the district of the "residence of either the plaintiff or the defendant."

The question for determination is whether the paragraph last quoted shall be held to limit the jurisdiction of the court or whether it shall be held to relate not to the jurisdiction but to the district in which suit shall be brought.

The first paragraph of said section quoted declares that the Circuit Court of the United States shall have jurisdiction of cases involving the jurisdictional amount and where a federal question is involved, and also of cases involving such jurisdictional amount and where the parties are citizens of different states. By the last paragraph of the section

quoted, it is provided that in cases involving a federal question, suit shall be brought in the district whereof the defendant is an inhabitant, but that in cases where no federal question is involved, but where the parties are citizens of different states, such suit may be brought either in the district of the residence of the plaintiff or the defendant.

This suit was not brought in the district of which the defendant is an inhabitant, neither was it brought in the district of which the defendant is a resident, nor was it brought in the district whereof the plaintiff is a resident. The case is one which is within the terms of the first paragraph of said section quoted, inasmuch as the jurisdictional amount is involved and the parties are citizens of different states, the plaintiff being a citizen of Utah and the defendant a citizen of New York. If the provision in the second paragraph of the section quoted as to the district in which suit shall be brought is one which cannot be waived, the court did not have jurisdiction of this case; if, upon the other hand, such provision may be waived and was waived by both of the parties to this suit, then the trial court did have jurisdiction, and its decision dismissing the case was erroneous.

This court has many times passed upon the question in construing the sections quoted above; it has also in numerous instances answered the question in construing the judiciary act of 1789. The question has never been determined but one way and that is adversely to the determination of the trial court.

In

St. Louis, Etc., Railway Company, vs. McBride,
141 U. S., 127; 35 L. Ed., 659,

suit was brought in the Circuit Court of the United States for the Western District of Arkansas, by the plaintiff who was a citizen and resident of the Western District of Arkansas against the defendant Railway Company, which was a corporation organized under the laws of Missouri and a citizen of that State. The jurisdiction of the court was invoked solely upon the ground of the diverse citizenship of the parties. The first appearance on behalf of the defendant was the filing of a demurrer on three grounds, specified as follows:

"First: Because the court has no jurisdiction of the "person of the defendant.

"Second: Because the court has no jurisdiction of the "subject matter of the action.

"Third: Because the complain does not state facts "sufficient to constitute a cause of action."

This court, in reviewing the case, held that the filing of this demurrer on behalf of the defendant constituted a general appearance upon its part and that it could not thereafter be heard to make objection that suit had not been brought in the proper district or that the trial court had no jurisdiction of the case on that account. The opinion of the court was delivered by Mr. Justice Brewer, who upon this point, after reviewing the authorities, said:

"It is obvious that the party who in the first instance "appears and pleads to the merits, waives any right to chal- "lenge thereafter the jurisdiction of the court on the ground "that the suit has been brought in the wrong district."

In another part of the opinion it was said:

"Assuming that service of process was made, although "the record contains no evidence thereof, and that the de- "fendant did not voluntarily appear, its first appearance was "not to raise the question of jurisdiction alone but also that "of the merits of the case. Its demurrer, as appears, was "based on three grounds, two referring to the question of "jurisdiction, and the third that the complaint did not state "facts sufficient to constitute a cause of action. There was, "therefore, in the first instance, a general appearance to the "merits. If the case was one of which the court could take "jurisdiction, such an appearance waives not only all de- "fects in the service, but all special privileges of the defend- "ant in respect to the particular court in which the action "is brought."

This court was next called upon to construe the provisions of the section quoted in the case of

Texas Etc. Railway Company vs. Cox, 145 U. S. 593, 36 L. Ed., 829,

which was a suit (wherein was involved a federal question) brought in the United States Circuit Court for the Eastern

District of Texas, by a citizen of Texas against two individuals as receivers of the Railway Company, one of which receivers resided in the Northern District of Texas, and the other was an inhabitant of Louisiana. As in this case, the first appearance on the part of defendants was by the filing of a demurrer, the second ground of which was that the petition did not set out a cause of action. Subsequently the defendants sought to raise the objection that the court was without jurisdiction, because the suit had been brought in a district of which neither one of the defendants was an inhabitant. This court held, however, Mr. Chief Justice Fuller delivering the opinion of the court, that objection to the district in which suit was brought was an objection which might be waived; that it had been waived by the defendants by the filing of their demurrer and that thereafter they could not be heard to challenge the jurisdiction of the court on that ground. The decision of this court was again rendered to the same effect in the case of

Texas, Etc. Railway Company vs. Saunders, 151 U. S. 105; 38 L. Ed. 90.

Central Trust Company vs. McGeorge, 151 U. S. 129; 38 L. Ed. 98,

was a suit filed by the Central Trust Company, a corporation, organized under the laws of the State of New York in the U. S. Circuit Court for the Western District of Virginia, against a corporation organized under the laws of the State of New Jersey. The defendant entered a general appearance. Thereafter McGeorge filed a petition in intervention, in which it was alleged that the court was without jurisdiction because the suit was not brought in the district of the residence of either the plaintiff or defendant. The court thereupon made an order and judgment dismissing the suit for lack of jurisdiction, from which judgment an appeal was prosecuted to this court and the same was advanced for hearing on motion of the appellant under Rule 32 of this court. This court held, speaking through Mr. Justice Shiras, that the objection that the suit was brought in the wrong district could not be made after the defendant had made a general appearance and that the judgment of the Circuit Court in dismissing the suit for lack of jurisdiction was therefore erroneous.

In construing the judiciary act of 1789, this court has several times rendered its decision to the same effect.

Ex parte Schollenberger, 96 U. S. 369; 24 L. Ed. 853.
Tolan vs. Sprague, 27 U. S. 300; 9 L. Ed. 1093.
Pollard vs. Dwight, 8 U. S. 421; 2 L. Ed. 666.
Barry vs. Foyles, 26 U. S. 311; 7 L. Ed. 157.

The decisions of this court as to this matter have been followed throughout the different circuits in numerous instances.

In the case of

Baltimore & Ohio Railroad Company vs. Doty, 133 Fed. 866,

the U. S. Circuit Court of Appeals for the Sixth Circuit held, following the decisions of this court, that objection to the district where an action had been brought was waived by the defendant whose first appearance in the suit was a demurrer to the merits in which was joined a plea claiming the privilege of being sued in the district of his residence.

The same court rendered a like decision in the case of

Carter, Etc. Company vs. Pcurrung, 86 Fed. 439.

The Circuit Court of Appeals for the First Circuit also decided this question in the same way.

Walker vs. Bank, 56 Fed. 76.

So also did the Circuit Court of Appeals for the Eighth Circuit.

Southern Express Company vs. Todd, 56 Fed. 104.

Instances in which the decisions of this court cited above have been followed in the different Circuit Courts are the following:

Eddy vs. Lafayette, 49 Fed. 810.
The Willamett, 70 Fed. 878.
United States vs. Winans, 73 Fed. 72.

Marks vs. Marks, 75 Fed. 332.
Callahan vs. Hicks, 90 Fed. 539.
Rodgers vs. Pitt, 96 Fed. 668.
Scott vs. Hoover, 99 Fed. 247.
Platt vs. Massachusetts Real Estate Company, 103 Fed. 706.
Lewis vs. American Naval Stores Company, 119 Fed. 396.
Barnes vs. Western Union Telegraph Company, 120 Fed. 555.
Occidental, Etc. Company vs. Comstock Tunnel Company, 120 Fed. 519.
Von Voight vs. Michigan Central Railroad Company, 130 Fed. 398.
Wolff vs. Choctaw, Etc. Railroad Company, 133 Fed. 601.

The rule in support of which the foregoing cases have been cited is clearly established, also by the decisions in which it has been held that suits brought in the wrong district were properly dismissed, timely objection having been made.

In re Keasbey & Mattison Company, 160 U. S. 221,

was a suit brought in the United States Circuit Court for the Southern District of New York, against a corporation organized under the laws of the State of Massachusetts. The first appearance of the defendant corporation was a special one made for the sole purpose of moving to set aside service of process upon it upon the ground that it was not subject to be sued in the said court for the reason that it was neither a resident nor inhabitant of the said district. The motion was sustained and the case having come into this court for review this court said concerning this point:

"The objection, having been seasonably taken by the "defendant corporation appearing specially for the purpose, "was rightly sustained by the circuit court."

Shaw vs. Quincy Mining Company, 145 U. S. 444,

was a suit also brought in the United States Circuit Court for the Southern District of New York against a corpora-

tion organized under the laws of Michigan. The defendant corporation appeared specially and moved to set aside the service of process. Concerning the sustaining of said motion by the trial court, this court said:

"The Quincy Mining Company, a corporation of Michi-"gan having appeared specially for the purpose of making "the objection that it could not be sued in the southern dis-"trict of New York by a citizen of another state, there can "be no question of waiver such as has been recognized "where a defendant has appeared generally in a suit be-"tween citizens of different states brought in the wrong "district."

Foulk vs. Gray, 120 Fed. 156,

was a suit originally brought in the Circuit Court of the State of West Virginia in and for the County of Mingo, by the plaintiff, a citizen and resident of Ohio against certain defendants all of whom were residents and citizens of Kentucky. In the state court the defendants appeared in due time and filed their petition for removal of the case to the United States Circuit Court for the Southern District of West Virginia, to which court the case was removed. Upon the filing of the papers in the case in said United States Circuit Court, the plaintiff appeared and filed his motion to remand the case to the state court, which motion was sustained.

From the opinion in the case, we quote the following:

"I venture to say that, in every case in which the "jurisdiction has been upheld by reason of a waiver on the "part of defendant, there has also been a waiver on the part "of the plaintiff. In all these cases the plaintiff waives his "right to object to the jurisdiction by bringing his suit in "that court. The defendant waives his right by entering a "general appearance to the action. While jurisdiction of "the subject matter is fundamental, and cannot be waived "by the parties, and jurisdiction of the person may be "waived, yet it is a right which must be waived to give "jurisdiction; and, what is more, it must be waived by both "parties."

Ex Parte Abraham C. Wisner, 203 U. S. 449; 51 L. Ed. 264,

was a suit brought by the plaintiff a citizen of the State of Michigan in the Circuit Court in and for the City of St. Louis in the State of Missouri, against a defendant who was a citizen of the State of Louisiana. The defendant appeared in the state court and filed his petition for the removal of the case to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri and which petition was granted by the state court and upon the papers in the case being filed in the United States Circuit Court, the plaintiff appeared and filed his motion to remand the case to the state court. His motion having been overruled, the matter was brought into this court for review. It was argued in this court on behalf of the plaintiff that the case was one which was not removable to the state court from the federal court and that, consequently, the attempted removal did not serve to divest the state court of jurisdiction or to give such jurisdiction to the federal court. The contention of the plaintiff was adopted by this court. In the course of the opinion delivered by Mr. Chief Justice Fuller, it was pointed out that under the second section of the Act of Congress of March 3, 1887, as corrected by the Act of August 13, 1888, suits brought in a state court were only removable to the Circuit Court of the United States for the proper district and that the proper district, according to the terms of the act was the district where such suit could have originally been brought and maintained, regardless of any objection which might be made to the bringing of the suit in such district. Since no right of removal existed in the case under consideration, the attempted removal was ineffectual to vest the United States Court with jurisdiction. It was also held that the provisions by which the right of removal of the case are created are jurisdictional and that if in a case no right of removal exists such right cannot be created by the consent of the parties. The case was further distinguished from cases such as the one at bar by the fact that in such cases the objection to the place of trial of the case is waived by both parties; by the plaintiff by the bringing of his suit in such district and by the defendant by failing to specially appear in the suit in the first instance and make the proper objection. There is nothing in the opinion which leads even in the remotest

degree to the inference that the previous decisions of this court cited in this brief were in any way disapproved; on the contrary, the case is carefully distinguished from all of such cases.

We submit that it must be held that objection to the bringing of this suit in the district other than that of the residence of the plaintiff or of the defendant or of which the defendant is an inhabitant has been waived and the case being one cognizable by the Circuit Courts of the United States, the decision of the trial court was erroneous and should be reversed.

It is perfectly clear that the determination of this case cannot be in any way affected by the question of whether the case is one in which there is or is not a federal question, since as we have pointed out above, the case was not brought either in the district of the residence of the plaintiff or defendant as the act requires when jurisdiction depends solely upon the fact of the diversity of the citizenship of the parties or in the district of which the defendant is an inhabitant as is required in suits arising under the Constitution or laws of the United States. Since the determination of that question is unnecessary to the decision of the case, it will of course, not be passed upon by this court; and we have so far made no reference to the existence or nonexistence of such question. We do not, however, wish our position to be misunderstood.

The complaint alleges that on the 15th day of June, 1867, one William Birdsell settled upon certain described land; that the said Birdsell afterwards made entry of the said lands in the United States land office, under the homestead laws of the United States; that he made his final proof upon the said lands and afterwards received a patent therefor (T 8); that at the time that Birdsell became the owner of said lands the waters of Silver Bow creek flowed upon and across the same in the natural channel of the said stream; that the plaintiff acquired title to said lands by reason of mesne conveyances from Birdsell (T 10); that any appropriation of the waters of Silver Bow creek made by the defendant or its predecessor in interest were subsequent in point of time to the time when Birdsell acquired such rights as a riparian owner (T 10); that the defendant

by the operation on the banks of Silver Bow creek, several miles above the said land of a mill for the concentration of mineral bearing ores had caused the waters of such stream to become impregnated with copper and other poisonous substances and had caused particles of pulverized quartz to be carried down in such stream, filling up the bed and diverting the stream from its natural course (T 9-11), and the plaintiff seeks to recover for such diversion of the stream from its natural channel, as well as for the pollution of the stream and also for other injuries (T 9-10).

As to the matters mentioned, the second amended complaint does not differ from the original complaint (T 14-18).

The law which controlled the plaintiff in determining what matters should be set forth in its complaint in this case is section 671 of the Code of Civil Procedure of the State of Montana, which provides as follows:

"The complaint must contain * * * * a state-
"ment of the facts constituting the cause of action in ordi-
"nary and concise language * * * * *."

The Act of Congress of July 26, 1866, (Chapter 262) provides that whenever the right to the use of water for mining and other purposes has vested and accrued, the owner of such vested rights shall be protected in the same. The averment in the complaint therefore that at the time Birdsell acquired his rights as riparian owner the defendant or its predecessor in interest had acquired no right by appropriation or otherwise in or to the waters of such stream, is a necessary allegation, and Birdsell as such riparian owner and the plaintiff as his successor in interest had no right to recover damages because of the diversion of such stream unless the time at which the title of Birdsell vested was prior in point of time to any appropriation of such waters by the defendant or its predecessor in interest, and in order to determine such priority it is of course, necessary to determine the date at which the title of Birdsell vested. If the title conferred upon him by the patent issued to him by the United States related back only to the date of entry of the said lands then the title of Birdsell vested as of that date; if upon the other hand, such title related back to the date of settlement then his title vested as of that date and the determination of the question of whether or not Bird-

sell acquired a right as riparian owner in and to the waters of the said stream, if the same flowed upon and across such lands at the date of his settlement upon the same, but not afterward, depends upon the effect to be given to the Act of Congress of March 14, 1880, Chapter 89 (21 Stat. at Large 141), which provides that the title of an owner who acquires land under the homestead laws shall relate back to the date of settlement.

The precise question has never been passed upon by this court, though it has held that such right relates back to the date of entry.

Since the determination of this question is unnecessary to the decision of the case we shall not discuss it. The existence of the question is mentioned in order that the court may not assume that we admit that such question does not exist.

Respectfully submitted,

JOHN A. SHELTON,
Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 351

WESTERN LOAN AND SAVINGS COMPANY,
Plaintiff in Error,

vs.

BUTTE AND BOSTON CONSOLIDATED MINING COMPANY,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The contention of the defendant in error that objection to suit being brought against it in a Circuit Court of the United States, in a district other than that of of which it is an inhabitant or in a district other than that of which either the plaintiff or the defendant is a resident, has not been waived by its first appearance being a general one, is untenable.

The defendant in error first assumes that the objection can only be raised by a pleading and then goes on to argue that since the action is one at law, and the procedure must therefore, under the act of June 1st, 1872 (Paragraph 5, 17 Stat. at Large, 197), be in accordance with that prevailing in the courts of the state in which the suit is brought, that the objection cannot be made by any pleading unless a general appearance is entered, unless the defendant waives some other objection which it may have to the

complaint. The gist of the defendant in error's argument is that, under Section 680 of the Code of Civil Procedure of Montana, the defendant is permitted to demur to the complaint of the plaintiff upon the ground among others, that the court has no jurisdiction of the person of the defendant, and that the complaint is ambiguous and that a failure to specify in a demurrer the ground of ambiguity is a waiver of that objection. Therefore, according to the contention of the defendant in error, it must be permitted to include in its demurrer, the ground that the complaint is ambiguous, and the fact that it does include that ground cannot be held to be a waiver of the objection that suit is brought in the wrong district, and that the court, therefore, has not acquired jurisdiction of the person of the defendant.

We submit that the contention is without force. Assuming for the sake of argument that the objection can only be raised by demurrer and that, if, in the demurrer filed, the defendant fails to specify as a ground that the complaint is ambiguous, that such objection is waived, it does not necessarily follow that the fact that such ground of demurrer is specified is not a waiver of objection to being sued in the wrong district. Under the situation of affairs stated, the defendant has the privilege of electing as to which of the objections will be made. If the objection that suit is brought in the wrong district is good, then the defendant can lose nothing by waiving the objection that the complaint is ambiguous, because the objection to the maintaining of the suit in the wrong district must be sustained and the complaint dismissed.

The defendant in support of this contention places reliance upon the cases of Sheppard vs. Graves, 14 How. 505, and Roberts vs. Lewis, 144 U. S. 653. The effect of those decisions is that prior to the passage of the act of June 1st, 1872, objection to the jurisdiction of the court must have been made by demurrer or plea in abatement, and that the passage of the said act repealed such requirement, and thereafter such objection could be made according to the method prevailing in the courts of the state where the suit was brought.

The statement of counsel for defendant in error on Page 9 of Brief, to the effect that no other ground of demurrer except the jurisdictional one was ever presented to the trial court is erroneous. In the argument of the first demurrer filed, the jurisdictional ground was not urged upon the court at all, and the court passed upon all of the grounds of demurrer specified and overruled such demurrer upon all the grounds specified save one (T. 13).

The assumption of the defendant in error that the objection can only be made by demurrer is erroneous. Under the Code of Civil Procedure of Montana, Sections 1820 to 1825, such objection may be made by motion. Said Section 1820 is as follows:

"Every direction of a court or judge made or en-
"tered in writing and not included in a judgment is
"denominated an order; an application for an order
"is a motion."

If the defendant had desired to make the objection, it could have appeared specially and moved the court to dismiss, or it could have made a motion to quash the service of process. The Practice Act of Montana originated in New York, was adopted in California, and later in Montana. In re Keasbey & Mattison Company, 160 U. S. 221, and Shaw vs. Quincy Mining Company, 145 U. S. 444, cited in our brief in chief, were cases begun in the State of New York. In each of those cases the objection was made by the defendant specially appearing and moving to set aside the service of process.

owry vs. Tile, 98 Fed. 817, was a case brought in the United States Circuit Court for the Northern District of California. It was held in that case that the defendant by specifying in its demurrer grounds which went to the merits of the action, waived the objection that suit was brought in the wrong district.

In the case of Central Trust Company vs. McGeorge, 151 U. S. 129, cited in our brief in chief, this court said the objection is one which may be made by motion.

We submit that the defendant by appearing generally in this case without first appearing specially and making the objection that the suit was not brought in the proper district, waived such objection.

Respectfully submitted,

JOHN A. SHELTON,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

NO. 351

WESTERN LOAN AND SAVINGS COMPANY,
PLAINTIFF IN ERROR.

vs.

BUTTE AND BOSTON CONSOLIDATED MINING COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF OF DEFENDANT IN ERROR.

It appears from the transcript and brief filed in the above entitled cause that this is an action at law brought by the Western Loan and Savings Company, a corporation and citizen of the State of Utah, against the Butte and Boston Consolidated Mining Company, a corporation and citizen of the State of New York.

The writ of error is directed to the action of the court in sustaining the demurrer interposed on the part of the defendant in error to the second amended complaint of the plaintiff in error, on the ground that the Circuit Court of the United States for the District of Montana was without

jurisdiction of the action. (Trans. p. 23.) That the court was without jurisdiction in the first instance is apparent from a mere inspection of the complaint which alleges that the plaintiff is a citizen of the State of Utah, and that the defendant is a citizen of the State of New York. The questions therefore which are presented for the consideration of this court are:

First: Could the defendant waive the question of jurisdiction of the court to entertain the action; and,

Second: If it was possible for the defendant to have waived the question of jurisdiction of the court, did the defendant in this action confer jurisdiction upon this court by waiver or consent.

FIRST.

COULD JURISDICTION BE CONFERRED UPON THE COURT IN THIS ACTION BY WAIVER OF THE DEFENDANT?

The sole ground upon which any jurisdiction existed in the United States Circuit Court for the District of Montana to try this action is upon the ground of the diverse citizenship of the parties to the action. The Act of Congress of 1887, as corrected in 1888, limiting and defining the jurisdiction of the Circuit Courts of the United States, contains the following provision:

> "But where the jurisdiction (referring to District Courts or Circuit Courts) is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."
>
> 24 Statutes at Large, 552;
> 25 Statutes at Large, 534.

This provision of the statute has been before this court many times for interpretation, and it has uniformally been held that the purpose of the statute was to contract the jurisdiction of the District and Circuit Courts of the United States.

See

Ex parte Wisner, 203 U. S. 449;
Smith vs. Lyon, 133 U. S. 315;
In re Pennsylvania Co., 137 U. S. 451, 454;
Fisk vs. Henarie, 142 U. S. 459;
Southern Pacific vs. Denton, 146 U. S. 202.

Defendant in error believes that the purpose of the Act referred to, being to contract the jurisdiction of Circuit Courts of the United States, the territorial jurisdiction within which the court could properly exercise its functions was limited and no jurisdiction could be granted by consent of the parties if the necessary residence qualification prescribed in the statute did not exist.

In Ex parte Wisner, *supra*, the Court says:

> "In the present case neither of the parties was a citizen of the State of Missouri, in which state the suit was brought, and therefore *it could not have been brought in the Circuit Court in the first instance.* Wisner did not, of choice, select the state court as the forum, *since he could not have sued in the Circuit Court under the act*, because neither he nor Beardsley was a citizen of Missouri. And the question of jurisdiction relates to the time of commencing the suit. But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as *in view of the intention of Congress by the Act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have been obtained, even with the consent of both parties.*"

By this decision this court clearly held that the question of jurisdiction where neither party is a resident of the district relates to the commencement of the action, and that jurisdiction in such an action could not be conferred by consent of the parties.

This construction of the decision of this court in Ex parte Wisner, *supra*, was followed by the Honorable Circuit Court of Appeals for the Ninth Circuit, in the case of

Yellow Aster Min. & Mill. Co. vs. Crane Co., 150 Fed. 580;

which was tried in the lower court without objection to the jurisdiction being made, and a judgment entered; but upon appeal the Circuit Court of Appeals, of its own motion, dismissed the case for lack of jurisdiction.

Defendant in error believes that there is a fair distinction between cases of this character where the statute conferring jurisdiction on a court expressly limits its jurisdiction to certain territorial limits, or prescribes certain residential qualifications in order to permit suits and to maintain an action, and cases in which because of some irregularity in the service of process parties are held to confer jurisdiction as to the person upon courts by entering a general appearance. In cases of the latter description there is no question presented as to the inherent jurisdiction of the Court itself when once acquired over the person of the party, the only question being as to the manner in which such control over the person was obtained. In this case, under the plain provisions of the statute heretofore quoted, the Court is without any jurisdiction to proceed or to entertain the suit. This distinction is recognized and pointed out in

Woodruff vs. Imperial Fire Ins. Co., 90 N. Y. 521, at page 529,

where the Court says:

> "There are no doubt many cases where the Court having jurisdiction over the subject matter may proceed against a defendant who voluntarily submits to its decision, but where the state prescribes conditions under which a Court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact. (Risley vs. Phenix Bank, 83 N. Y. 318, 337; 38 Am. Rep. 421; Wheelock vs. Lee, 74 N. Y. 495; Hoag vs. Lamont, 60 id. 96.)"

In

Burckle vs. Eckhart, et al., 3 N. Y. 133,

the position of the defendant in error is clearly pointed out in the following language:

> "The jurisdiction of courts is conferred by law, and in no case by consent of parties. When jurisdiction of the subject and person is required as a prerequisite to judicial action, a defendant may waive any irregularities in the mode by which his person is sought to be subjected to the jurisdiction of the court, by a voluntary appearance. He may dispense with the service of process, as he may waive any other personal privilege. But when the defendant is in court as a party, the law gives jurisdiction of the person, without regard to the question whether his appearance was voluntary or by compulsion. This is all that is meant by consent giving jurisdiction of the person, and all that is decided in the cases to which we have been referred. * * * * The residence of a defendant within the limits of the circuit, according to the 3d subdivision of 2d section of the statute above quoted, is a jurisdictional fact which must exist before the court can act at all, either by issuing process or accepting the appearance of a defendant. It is necessary to give jurisdiction of the cause, not of the person. In such case there can be no waiver."

See also,

Parkhurst vs. Rochester Last. Mach Co., 20 N. Y. Supp. 395;

Heenan vs. Railway Co., 34 Hun. 602.

While this action is not such an action as would ordinarily be classed as a local action, by reason of the plain provisions of the statute the residence of either the plaintiff or the defendant is made jurisdictional of the cause, and to that extent fixes the *locus* of the venue upon which jurisdiction depends to try the action; and the ordinary rule with reference to the venue of an action where the same is prescribed by the legislative power is applicable.

In this connection, see Works on Jurisdiction, page 327, where the rule which defendant in error believes is analagous is stated in the following language:

> "But in this connection the distinction between transitory actions, which affect the question of jurisdiction of the person, and actions *in rem*, in which the place of trial affects the jurisdiction of the subject matter, is important to be remembered. In the former, jurisdiction may be given by consent or appearance. In the latter, appearance or consent can not give jurisdiction. In the former, the party may relieve himself from a trial and judgment against him by timely objection, and if he does not the judgment is valid. In the latter the court has no jurisdiction even where the party appears and consents that it may act, and any judgment it may render with the parties all before it is absolutely void."

We believe that the foregoing authorities amply sustain the principle that where the law itself gives no jurisdiction, the same cannot be supplied by any act or consent of the parties; and that under the Act of 1887 the rule where neither of the parties is a resident of the district is the same as if no diverse citizenship existed, and in such case this court has repeatedly held that jurisdiction cannot be conferred by any consent or act of the parties.

Defendant concedes that under the Act of 1789 and the Act of 1875 this court has frequently held that the jurisdiction of the person might be waived by a general appearance or the entering of a plea to the merits of the action, and that since the passage of the Act of 1887 and 1888 this court has assumed in some of the cases passed upon by it that the same rule still existed. Defendant believes, however, that a clear distinction between the former Acts of Congress and the one now in force exists in the omission from the Acts of 1887 and 1888 the phrase "wherein the defendant may be found." Under an Act containing this language it was unquestionably true that where a defendant appeared generally in a case pending, the court was justified in assuming that he had been found in that district. The very fact of his general appearance brought him before the court, and he was then, if at no

previous time, for all purposes of the suit in the district in which the action was brought.

The objection to jurisdiction upon the ground that a party was not a citizen of the state or district wherein the action was pending, or that he had not been found therein, was waived by a general appearance, was but an affirmation of the general rule above stated that if the court is not otherwise limited by law as to its jurisdiction it will proceed to hear and determine a controversy existing between parties over which jurisdiction has been acquired without reference to the manner of it thus acquiring jurisdiction of their persons.

We submit, therefore, that under the provisions of the Act of Congress now in force, and the interpretation given the statute in the case of Ex parte Wisner, *supra*, ~~that~~ jurisdiction of the person of the defendant could not by any act of the defendant be conferred upon the Circuit Court for the District of Montana.

SECOND.

Assuming, however, that it was possible for the defendant to have conferred jurisdiction by waiver upon the Circuit Court, did it do so in this case?

The contention of the plaintiff in error is that by uniting other general grounds of demurrer with the ground as to the jurisdiction, a general appearance was made which waived any question of jurisdiction over the person of the defendant. This being an action at law, by virtue of the Act of Congress of June, 1872, Revised Statutes, Section 914, U. S. Comp. St. 1901, page 684, known as the "Conformity Act," the state practice is made applicable to all actions at law in the Circuit Courts of the United States. By virtue of the Practice Acts of the State of Montana, it was necessary for the defendant within twenty days from the service of summons to appear in the action by answer or demurrer. No other pleadings on the part of the defendant are provided for in the state practice.

Section 662 of the Code of Civil Procedure of Montana provides:

> "The only pleadings allowed on the part of the plaintiff are: 1. The complaint. 2. The demur-

rer to the answer. 3. The reply to defendant's answer. And on the part of the defendant: 1. The demurrer to the complaint. 2. The answer. 3. The demurrer to reply."

Section 680 of the Code of Civil Procedure of the State of Montana provides:

"The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action, or,

2. That the plaintiff has not the legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

5. That causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible or uncertain."

By the provisions of the statute last quoted the only manner in which the question of jurisdiction appearing upon the face of the complaint could be raised by the pleadings was by making the same a ground of demurrer in accordance with the provisions of the statute. Only one demurrer being permitted by the statute, it is necessary that all the grounds of demurrer be stated in the same demurrer, although numbered separately under their proper and appropriate heads. This was what the defendant in error was obliged to do under the state practice, and what it did do in filing the demurrer.

Under the state practice it cannot be said that there was any waiver of the jurisdictional objection by uniting other grounds of demurrer with it, as unquestionably if the lack of jurisdiction occurred in a case pending in the

state court, it could be united in a demurrer with other grounds provided for by the statute.

When the demurrer was set for hearing, the defendant in error insisted before taking up or discussing any of the other grounds of demurrer, that the demurrer with reference to the jurisdiction of the court should first be taken up and disposed of. (Trans. p. 23.) And this the court did. No other ground of demurrer was presented, or has ever been presented to the court.

To hold that the defendant should have appeared specially and raised the question of the jurisdiction of the court would be to have compelled the defendant to do something which under the state practice it was not permitted to do, on the one hand; and to hold that if it appeared by demurrer and raised the question of jurisdiction it could not have raised other apparent defects in the complaint of plaintiff appearing upon the face thereof, without waiving the question of jurisdiction would be to penalize the defendant in error to the extent of obliging it to abandon either the question of jurisdiction or other defects that might exist in the complaint, none of which except the ground of a failure to state a cause of action could ever be taken advantage of at any other time, and would be a denial to the defendant in error of the right to follow the state practice in the action.

We believe that the decisions of this court plainly hold that by uniting these grounds of demurrer, as directed by the state statute, the defendant has not waived any jurisdictional question. Prior to the passage of the "Conformity Act" of June, 1872, this court held in the case of

Sheppard vs. Graves, 14 How. 505,

that an objection to the truth of the allegation of diverse citizenship which, of course, is essential to jurisdiction in the Circuit Courts, must have been raised by plea in abatement, and that an answer upon the merits waived all right to make such objection.

After the passage of the "Conformity Act," in the case of

Roberts vs. Lewis, 144 U. S. 653,

this court held that by the statute of the state court the practice of filing pleas in abatement, having been abolished,

and under such statute it being the practice to set forth all defenses in one answer, the party did not waive this question by uniting a denial of the allegation of citizenship in the answer with other defenses upon the merits of the action.

Also, see

Cole vs. Carson, 153 Fed. 278;
Yocum vs. Parker, 130 Fed. 770;
Roberts vs. Langenbach, 119 Fed. 349.

In the present cause, following the state practice, the defendant first incorporated in the demurrer its objection to the jurisdiction, and then united its other objections to the complaint. This it was compelled to do by the practice in the Circuit Court following the state statute.

PLAINTIFF'S REFERENCE TO FEDERAL QUESTION IN CAUSE.

Counsel for plaintiff in error in his brief states that the only question for determination by this court is as to whether the lower court had jurisdiction of the cause in view of the non-residence in the district of either of the parties.

On page 11 of his brief, counsel calls attention to certain allegations, evidently for the purpose of calling the court's attention to the fact that there may be a federal question presented, although counsel for plaintiff in error insists that it is not a question for determination by this court at this time. We agree with counsel that the only question for determination is as to the effect of the non-residence in the district of the parties; but we do not wish to admit that there is the slightest ground for intimating that there is any possible federal question presented in this cause.

Counsel in his brief, at page 11, calls attention to certain allegations in the original complaint, evidently for the purpose of conveying the impression that the defendant in the cause may claim the right to pollute the waters of Silver Bow Creek, and thus injure plaintiff by reason of an appropriation of such waters, made prior to the date of the entry of the lands in controversy by plaintiff's predecessor in interest, and the date of settlement by plaintiff's

said predecessor upon said lands, and that thus there would be a question presented for the trial court to determine whether the riparian right of plaintiff's predecessor relates back to the settlement or merely to the date of the entry of the lands. We submit that there can be no such question for determination in this cause, for at least three reasons:

First: Plaintiff's pleading upon which this cause now stands for determination is its second amended complaint, the original and first amended complaint having been superceded, and therefore the allegations in the second amended complaint must of course control. There is no allegation in said second amended complaint, or any hint of any appropriation or claimed appropriation of any of the waters of Silver Bow Creek by the defendant or any of its predecessors. The reference to such an allegation, found on page 11 of plaintiff's brief, is to the original complaint. In preparing his second amended complaint, which is the only pleading with which we are now concerned, plaintiff omitted such allegation. So there is nothing in the pleading even intimating that such a question might be presented in the cause.

Second: Even if such a question could be injected into the cause by the allegations of the complaint, and if we consider the cause as now standing upon the original complaint, the allegation is insufficient to present such a question, because it does not charge that the defendant has or claims any such appropriation, but merely alleges that if any appropriation is claimed by the defendant, it is subsequent to plaintiff's right.

Third: Even if it be considered that the cause is standing on the original complaint, which it is not, which contains the allegations referred to, the allegation forms no material part of plaintiff's cause of action, and is merely an attempt to allege some defense or some controversy that may arise because of a position that may be taken by the defendant in the action. To make out its cause of action, all that it is necessary for plaintiff in error to state in its pleading, and to prove, is its ownership of the lands and water right or riparian right in question, the pollution of the waters by the defendant, and the damage sustained by plaintiff by reason thereof. The question whether

the defendant would attempt to defend the action upon the ground that it had appropriated the waters, and therefore had a right to pollute the same, or whether it would defend merely upon the amount of damage or rely for its defense upon other palpable grounds which might be suggested, would be merely a matter of defense, and one unnecessary for plaintiff to anticipate or go into.

That a federal question cannot be injected into the cause by allegations in the complaint as to defenses or claims that will or may be presented by the defendant, has been clearly and repeatedly held by this court; see

B. & M. C. C. & S. M. Co. vs. M. O. P. Co., 188 U. S. 632;

B. & M. C. C. & S. M. Co. vs. Chili Gold M. Co., 188 U. S. 645;

Tennessee vs. Union & Planter's Bank, 152 U. S. 454;

Third St. & Suburban R. Co. vs. Lewis, 173 U. S. 457;

Arkansas vs. Kansas & Texas Coal Co., 183 U. S. 185.

We respectfully submit that the only question presented for determination by this court is as to the jurisdiction of the lower court under the Act of 1887 as amended in 1888, and under that Act the lower court had no jurisdiction of the cause because of the non-residence of the parties in the district; that such jurisdiction could not be conferred by waiver or consent of the parties; and that even if the court be of the opinion that such jurisdiction could be conferred by consent, that under the practice of the Circuit Court, following the state practice of Montana, there has been no such waiver or consent in this cause; and we respectfully submit that the judgment of the Circuit Court dismissing the cause should be affirmed.

Respectfully submitted,

JOHN F. FORBIS,

L. O. EVANS and

C. F. KELLEY,

Of Butte, Montana, Solicitors and of Counsel for Defendants in Error.